

Date: December 8, 1997

Case No.: 96-INA-00020

***In the Matter of:***

NIPPON TRAVEL AGENCY,  
*Employer*

***On Behalf Of:***

TERUMI YOSHIOKA,  
*Alien*

Appearance: Emil Deguzman, Esq.  
For the Employer/Alien

Before: Huddleston, Lawson and Neusner  
Administrative Law Judges

RICHARD E. HUDDLESTON  
Administrative Law Judge

## **DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,<sup>1</sup> and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

On October 30, 1993, Nippon Travel Agency ("Employer") filed an application for labor certification to enable Terumi Yoshioka ("Alien") to fill the position of Hotel Reservation Coordinator (AF 4). The job duties for the position are:

To coordinate hotel accommodations and reservations for passengers of the Travel Agency; corresponds with affiliate companies abroad regarding requests for rooms, rates and answer special requisitions from passengers; to train clerks making reservations and in operating computers using Japanese Language Word processors; to send fax messages abroad regarding confirmation of reservation.

The requirements for the position are an Associate Degree in English Literature or Business, and two years of experience in the job offered. Other Special Requirements are must be able to read, write, and speak Japanese and operate Word Processors using Japanese Characters.

The CO issued a Notice of Findings on February 27, 1995 (AF 98-102), proposing to deny certification on the grounds that the requirements of an Associate Degree and two years of experience are unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2), as the *Dictionary of Occupational Titles* (DOT) requirements for the position are only a high school diploma and six months to one year of experience. The Employer was instructed to reduce the requirements and readvertise, or submit evidence to establish the business necessity of the requirements. The CO also found that the Employer had not documented that the Alien had the required two years of experience prior to being hired by the Employer in violation of § 656.21(b)(5). The Employer was instructed to reduce the requirements and readvertise, or submit evidence to establish why it is not feasible to hire someone with the same level of training as the Alien, or show that the Alien had the required experience when hired. The CO also found that the position was not properly posted in violation of § 656.20(g)(1).

In its rebuttal, dated March 24, 1995 (AF 103-22), the Employer contended that its requirements are necessary because 95% of the Employer's customers are in Japan, the position is equivalent to that of a "Hotel Reservations Manager" and not a "Reservation Clerk" as it entails the training of other clerks, and that the level of foreign language ability requires additional education and experience. The Employer further stated that the Company is not equipped to provide a U.S. employee with five to ten years of training in the Japanese language

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<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

which would be required for sufficient fluency, and there was no such position when the Alien was trained by the former manager of the Agency. The Employer included a letter from a Japanese college professor stating that the position requires two years of college training, and a copy of a trade magazine article which states that two to four years of college are routinely required for this position. The Employer stated that a copy of the job posting was included with its rebuttal documents, but no evidence of the posting accompanied those documents.

The CO issued the Final Determination on June 7, 1995 (AF 123-25), denying certification because the Employer failed to adequately document that the requirement of two years of experience was a business necessity, and it is therefore excessive, in violation of § 656.21(b)(2). Moreover, the CO noted that the position was that of Reservation Clerk, and not elevated to a Hotel Reservation Coordinator or Manager, merely by the duty of training clerks. The CO also noted that the Employer did not document evidence of the posting in violation of § 656.20(g)(1).

On July 10, 1995, the Employer requested review of the denial of labor certification (AF 125-54). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”).

### Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruiting process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (“DOT”), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement. A job opportunity has been described as being without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for the job in the U.S. *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*); *Duarte Gallery, Inc.*, 88-INA-92 (Oct. 11, 1989).

In this case, the CO denied certification because the Employer’s requirement of an Associate Degree and two years of experience was outside the levels of experience required for the position of “Reservation Clerk”<sup>2</sup> in the *Dictionary of Occupational Titles* (DOT), and the Employer had failed to document the business necessity of the requirement. The Employer

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<sup>2</sup> 238.362-014 RESERVATION CLERK (clerical) alternate titles: clerk, travel reservations; travel clerk Obtains travel and hotel accommodations for guests and employees of industrial concern, issues tickets, types itineraries, and compiles reports of transactions: Obtains confirmation of travel and lodging space and rate information. Issues and validates airline tickets from stock or teleticketer and obtains rail and bus tickets from carriers. Prepares passenger travel booklet containing tickets, copy of itinerary, written lodging confirmations, pertinent credit cards, and travel suggestions. Keeps current directory of hotels, motels, and timetables, and answers inquiries concerning routes, fares, and accommodations. Reviews routine invoices of transportation charges, and types and submits reports to company and to transportation agencies. Prepares and types claim forms for refunds and adjustments and reports of transactions processed.

contended that the position was actually that of “Hotel Reservation Coordinator or Manager,”<sup>3</sup> and the requirements were not excessive. A review of the positions in the DOT shows a number of duties for Hotel Reservation Coordinator or Manager, that are not included in the Employer’s application. Thus, we agree with the CO that the position is appropriately described as that of Reservations Clerk. Even accepting the employer’s argument that the position is that of Hotel Reservations Manager as opposed to Reservations Clerk, the SVP for the two positions is still the same, over 6 months up to and including 1 year.

Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (“DOT”), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

We have defined how an employer can show business necessity in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

In rebuttal, the Employer has submitted a letter from Ms. Emma Ruth D. Deguzman, who was an assistant professor at the Aoyama Gakuin University in Tokyo, Japan from 1975 to 1981 (AF 116). Ms. Deguzman stated that in her opinion the position of Hotel Reservations Coordinator requires skills in speaking and writing in English which require at least two years of college-level English courses. The Employer also submitted an article from *Career Brief* magazine which states that for “many managerial positions,” “most major hotels/motels are requiring a Bachelor’s Degree in hotel/motel administration or a related field” (AF 103-12).

While the Employer has submitted some evidence to justify its requirement, that evidence is insufficient to establish business necessity because it does not directly address the position being offered by this Employer. In the case of Ms. Deguzman, she states that the requirements are appropriate for a Hotel Reservations Coordinator, but we have already established that the position is a Reservations Clerk. In the case of the article from *Career Brief*, it addresses “managerial positions,” and there is no evidence that this position is managerial in nature. See

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<sup>3</sup> 238.137-010 MANAGER, RESERVATIONS (hotel & rest.) Supervises and coordinates activities of workers engaged in taking, recording, and canceling reservations in front office of hotel: Sorts reservations received by mail into current (up to 3 days) and future (over 3 days). Sends futures to reservation center in other hotel of chain. Gives current reservations to clerks for computerization. Receives contracts detailing room allotments for conventions from sales representative and feeds information into terminal. Corresponds with groups and travel agents to answer special requests for rooms and rates. Verifies that daily printouts listing guests' arrivals and individual guest folios are received by Room Clerks (hotel & rest.). Maintains weekly attendance sheet and sends to payroll department. Delegates assistants to train clerks in taking telephone reservations and in operating computer terminals and printers to store and receive reservation data. Reschedules workers to accommodate arrivals of conventions and other groups. Recommends promotion and discharge of workers to MANAGER, FRONT OFFICE (hotel & rest.). Performs other duties as described under SUPERVISOR (clerical) Master Title. DOT 238.137-010.

*Devera Gilden*, 93-INA-196 (June 9, 1994); *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989); *Tri-P's Corp.*, 88-INA-686 (Feb. 17, 1989).

Accordingly, we find that the Employer has failed to adequately document the business necessity of its requirements of an Associate Degree and two years of experience. The CO's denial of labor certification was, therefore, proper.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON  
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

